

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (Phentermine/
Fenfluramine/Dexfenfluramine)
PRODUCTS LIABILITY LITIGATION

MDL DOCKET NO. 1203

This document relates to:

Cases Listed in Exhibit A

**Defendants' Joint Motion to Dismiss Fraudulently Joined Parties with Prejudice
And Memorandum In Support Thereof**

The Individual Defendants, Wyeth, and Indevus Pharmaceuticals, Inc. ("Indevus") (together "the Defendants") in the above-captioned cases request that the Court dismiss with prejudice all Individual Defendants because they have previously been found to have been fraudulently joined.¹ Each of the Individual Defendants in these actions is a current and/or former employee of Wyeth or Indevus who is or was at one point in time a resident of the state of Georgia.² The Northern District of Georgia has held that the plaintiffs had fraudulently joined these Individual Defendants in an attempt to defeat federal jurisdiction. As this Court did in Pretrial Order No. 2946, the Defendants respectfully request that this Court dismiss with prejudice each of the

¹ The "Individual Defendants" are: Robert L. Scott, John A. Molnar, Steven Kaiser, Marsha M. Fuller, Robin W. Jones, Douglas W. Ray, Avery T. Lanius, Peyton R. Bacon III, Timothy B. Sharpe, Penny A. Anderson, Debra A. Martin, Sharon M. Binion, Lynn M. Rhodes, Janet M. Jackson, David Downing, Traci E. Mullis, David Nichols, Dane S. McCreight, David E. Wilkes, Robert Warren Dacus, Michael E. Winters, Woodford W. Moss, Terri S. Morton, Shannon L. Boggs, and Karen D. Suiter.

² David Downing is the only Indevus current or former employee named. He was named in *Hopper, et al. v. Wyeth, et al.* and *Mauser, et al. v. Wyeth, et al.*, No. 04-21196.

Individual Defendants and order that any amended complaints filed by these plaintiffs name only those defendants who have not been found to be fraudulently joined.

PROCEDURAL HISTORY

In June 2003, 14,554 plaintiffs from across the country brought 171 lawsuits against Wyeth in the Fulton County State Court of Georgia. In an attempt to avoid federal diversity jurisdiction, plaintiffs' counsel named at least one Georgia resident in each case as an Individual Defendant. These Individual Defendants were current and/or former employees of Wyeth or Indevus. The above-captioned cases subject to this Motion involve 151 of these lawsuits and approximately 7,518 of these plaintiffs.

After Wyeth removed these cases to federal court, all Individual Defendants were found to be fraudulently joined by Judge Robert L. Vining, Jr. of the United States District Court for the North District of Georgia. *See* Order Denying Remand, *In re Fen-Phen Litigation*, CA No. 1:03-MD-1-RLV (N.D. Ga. October 15, 2003) (finding that "plaintiffs . . . ha[d] engaged in fraudulent joinder in an attempt to defeat jurisdiction.") (attached as Ex. B). In issuing this order, Judge Vining relied upon and adopted the reasoning in "the July 30, 2003, decision by Judge Bartle in the MDL Litigation" *Id.* (citing Pretrial Order No. 2946).

In Pretrial Order No. 2946, this Court found fraudulently joined a number of individual current and/or former employees of Wyeth who were residents of Georgia, including some of the same plaintiffs named in the above-captioned cases. *See* Mem. and Pretrial Order No. 2946, at 14, 17-18. Accordingly, the Court dismissed with prejudice all "the claims against defendants Scott, Molnar, Anthony Adams, Robin Jones, [and] Avery Lanius . . . as fraudulently joined." *See* PTO 2946 at 22-23. Even though a

dismissal with prejudice is implicit in any finding of fraudulent joinder, Judge Vining did not expressly order the dismissal of the Individual Defendants in the above-captioned cases.

Because no severance order has yet to be entered with respect to any of the above-captioned cases, they are particularly amenable to a consolidated order that would dismiss with prejudice the fraudulently joined Individual Defendants.

ARGUMENT

In finding that federal diversity subject matter jurisdiction existed over these actions, Judge Vining found that the Georgia-resident Individual Defendants had all been fraudulently joined. *See* Exhibit A. The Third Circuit has explained that the standard for a dismissal under Rule 12(b)(6) is actually lower than the standard for finding fraudulent joinder:

[T]he inquiry into the validity of a complaint triggered by a motion to dismiss under rule 12(b)(6) is more searching than that permissible when a party makes a claim of fraudulent joinder. Therefore, it is possible that a party is not fraudulently joined, but that the claim against that party ultimately is dismissed for failure to state a claim upon which relief may be granted.

Batoff v. State Farm Ins. Co., 977 F.2d 848 (3d Cir. 1992). In accordance with these comparative standards of review, this Court recognized in Pretrial Order No. 2946 that when defendants are found to be fraudulently joined, all claims against those defendants should be dismissed with prejudice. *See* PTO 2946 at 22-23.

Although Judge Vining did not expressly dismiss the fraudulently joined Individual Defendants in these cases, he did find that federal jurisdiction existed because there was no reasonable possibility of a cause of action against the Individual Defendants. Consistent with that finding, the Defendants ask this Court to enter a consolidated order

formally dismissing with prejudice all claims in the above-captioned cases against the Individual Defendants. Absent a consolidated order prior to severance, the Court may have to decide one at a time whether the Individual Defendants remain proper defendants. Additionally, having a formal dismissal order in these cases will allow these individuals to move on with their lives by clarifying – for mortgage applications and otherwise – that they face no potential liability in these cases.

CONCLUSION

The Defendants respectfully request that the Court enter a consolidated order dismissing with prejudice all claims against Defendants John Molnar, Robert Scott, Steven Kaiser, Marsha M. Fuller, Robin W. Jones, Douglas W. Ray, Avery T. Lanius, Peyton R. Bacon III, Timothy B. Sharpe, Penny A. Anderson, Debra A. Martin, Sharon M. Binion, Lynn M. Rhodes, Janet M. Jackson, David Downing, Traci E. Mullis, David Nichols, Dane S. McCreight, David E. Wilkes, Robert Warren Dacus, Michael E. Winters, Woodford W. Moss, Terri S. Morton, Shannon L. Boggs, and Karen D. Suiter.

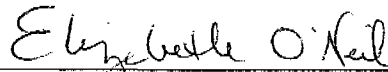
Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (Phentermine/
Fenfluramine/Dexfenfluramine)
PRODUCTS LIABILITY LITIGATION

MDL DOCKET NO. 1203

This document relates to:

The Cases Listed On Exhibit A

[PROPOSED] PRETRIAL ORDER NO. _____

AND NOW, on this ____ day of October, 2004, upon consideration of the "Joint Motion to Dismiss Fraudulently Joined Parties with Prejudice" filed by Wyeth, Indevus Pharmaceuticals, Inc. and the Individual Defendants in these actions, after consideration of the entire record and in recognition that Defendants John Molnar, Robert Scott, Steven Kaiser, Marsha M. Fuller, Robin W. Jones, Douglas W. Ray, Avery T. Lanius, Peyton R. Bacon III, Timothy B. Sharpe, Penny A. Anderson, Debra A. Martin, Sharon M. Binion, Lynn M. Rhodes, Janet M. Jackson, David Downing, Traci E. Mullis, David Nichols, Dane S. McCreight, David E. Wilkes, Robert Warren Dacus, Michael E. Winters, Woodford W. Moss, Terri S. Morton, Shannon L. Boggs, and Karen D. Suiter have been found to be fraudulently joined by the United States District Court for the Northern District of Georgia (*See* Order Denying Remand, *In re Fen-Phen Litigation*, CA No. 1:03-MD-1-RLV (N.D. Ga. October 15, 2003)), it is hereby ORDERED that

- (1) the Wyeth Defendants' Motion is GRANTED;
- (2) Defendants John Molnar, Robert Scott, Steven Kaiser, and Marsha M. Fuller, Robin W. Jones, Douglas W. Ray, Avery T. Lanius, Peyton R. Bacon III, Timothy B. Sharpe,

Penny A. Anderson, Debra A. Martin, Sharon M. Binion, Lynn M. Rhodes, Janet M. Jackson, David Downing, Traci E. Mullis, David Nichols, Dane S. McCreight, David E. Wilkes, Robert Warren Dacus, Michael E. Winters, Woodford W. Moss, Terri S. Morton, and Shannon L. Boggs, and Karen D. Suiter are hereby dismissed with prejudice; and (3) Plaintiffs shall not name John Molnar, Robert Scott, Steven Kaiser, and Marsha M. Fuller, Robin W. Jones, Douglas W. Ray, Avery T. Lanius, Peyton R. Bacon III, Timothy B. Sharpe, Penny A. Anderson, Debra A. Martin, Sharon M. Binion, Lynn M. Rhodes, Janet M. Jackson, David Downing, Traci E. Mullis, David Nichols, Dane S. McCreight, David E. Wilkes, Robert Warren Dacus, Michael E. Winters, Woodford W. Moss, Terri S. Morton, Shannon L. Boggs, and Karen D. Suiter as Defendants in any amended complaint filed in accordance with Pretrial Order No. 3370.

BY THE COURT:

Hon. Harvey Bartle III

Exhibit A

Exhibit A
Schedule of Actions

Joan M. Abegg-Gehring, et al. v. Wyeth, et al., Civil Action No. 04-21206
Cora V. Abegglen, et al. v. Wyeth, et al., Civil Action No. 04-21266
Cynthia H. Abercrombie, et al. v. Wyeth, et al., Civil Action No. 04-21332
Jackie Acree, et al. v. Wyeth, et al., Civil Action No. 04-21314
Margaret (Marnie) Adair, et al. v. Wyeth, et al., Civil Action No. 04-21254
Alice Adams, et al. v. Wyeth, et al., Civil Action No. 04-21209
Barbara J. Adams, et al. v. Wyeth, et al., Civil Action No. 04-20088
Betty Adams, et al. v. Wyeth, et al., Civil Action No. 04-20093
Jerilee Adams, et al. v. Wyeth, et al., Civil Action No. 04-20083
Bobbie Adkins, al. v. Wyeth, et al., Civil Action No. 04-21211
Deborah J. Agee, et al. v. Wyeth, et al., Civil Action No. 04-21320
Paulette Harris Agha, et al. v. Wyeth, et al., Civil Action No. 04-21210
Mari Agnew, et al. v. Wyeth, et al., Civil Action No. 04-20091
Herbert Aiken, et al. v. Wyeth, et al., Civil Action No. 04-21193
Sylvia Akers, et al. v. Wyeth, et al., Civil Action No. 04-20080
Christina Alarcon, et al. v. Wyeth, et al., Civil Action No. 04-21301
Kitty Albert, et al. v. Wyeth, et al., Civil Action No. 04-21258
LeAnn Albrecht, et al. v. Wyeth, et al., Civil Action No. 04-21192
Suzanne Albright, et al. v. Wyeth, et al., Civil Action No. 04-21222
Joanne Alexander, et al. v. Wyeth, et al., Civil Action No. 04-20092
James D. Allen, et al. v. Wyeth, et al., Civil Action No. 04-21298
Janet Allen, et al. v. Wyeth, et al., Civil Action No. 04-21220
Lavelle R. Allen, et al. v. Wyeth, et al., Civil Action No. 04-20090
Rhonda Allen, et al. v. Wyeth, et al., Civil Action No. 04-23140
Kristine Amussen, et al. v. Wyeth, et al., Civil Action No. 04-21191
Caren J. Anderson, et al. v. Wyeth, et al., Civil Action No. 04-21201
Connie E. Anderson, et al. v. Wyeth, et al., Civil Action No. 04-21208
Janet L. Anderson, et al. v. Wyeth, et al., Civil Action No. 04-21236
Kristine Anderson, et al. v. Wyeth, et al., Civil Action No. 04-21292
Patricia A. Andreasen, et al. v. Wyeth, et al., Civil Action No. 04-21219
Nola Arko, et al. v. Wyeth, et al., Civil Action No. 04-21221
Johnnie Armstrong, et al. v. Wyeth, et al., Civil Action No. 04-21269
Phyllis B. Arthur, et al. v. Wyeth, et al., Civil Action No. 04-20082
Linda Atkinson, et al. v. Wyeth, et al., Civil Action No. 04-21195
Sandra Augarten, et al. v. Wyeth, et al., Civil Action No. 04-21291
Pamela Leigh Aycock, et al. v. Wyeth, et al., Civil Action No. 04-20089
Walter J. Babson, et al. v. Wyeth, et al., Civil Action No. 04-20085
Connie M. Bailey, et al. v. Wyeth, et al., Civil Action No. 04-21217
Talmadge U. Bailey, et al. v. Wyeth, et al., Civil Action No. 04-21261
Carolyn Baker, et al. v. Wyeth, et al., Civil Action No. 04-20081
Laverne Baker, et al. v. Wyeth, et al., Civil Action No. 04-21228
Virginia L. Barker, et al. v. Wyeth, et al., Civil Action No.
Jennifer E. Bassi, et al. v. Wyeth, et al., Civil Action No. 04-21240

Della R. Baxter, et al. v. Wyeth, et al., Civil Action No. 04-21273
Dorothy M. Beard, et al. v. Wyeth, et al., Civil Action No. 04-21226
Bonnie C. Beaver, et al. v. Wyeth, et al., Civil Action No. 04-21302
Betty C. Beck, et al. v. Wyeth, et al., Civil Action No. 04-21234
Janice Becton, et al. v. Wyeth, et al., Civil Action No. 04-21265
Carol Bee-Latty, et al. v. Wyeth, et al., Civil Action No. 04-21255
Woneta A. Bellevue, et al. v. Wyeth, et al., Civil Action No. 04-21188
Helen E. Blash, et al. v. Wyeth, et al., Civil Action No. 04-21276
Sandra Bosque, et al. v. Wyeth, et al., Civil Action No. 04-21244
Yvonne Briscoe, et al. v. Wyeth, et al., Civil Action No. 04-21317
Joseph Brounstein, et al. v. Wyeth, et al., Civil Action No. 04-21249
Deborah S. Brown, et al. v. Wyeth, et al., Civil Action No. 04-21305
Richard Brown, et al. v. Wyeth, et al., Civil Action No. 04-21245
William K. Brown, et al. v. Wyeth, et al., Civil Action No. 04-21318
Rebecca Butler, et al. v. Wyeth, et al., Civil Action No. 04-21200
Joanna Carney, et al. v. Wyeth, et al., Civil Action No. 04-21263
Margaret Carter-Thompson, et al. v. Wyeth, et al., Civil Action No. 04-21205
Elaine Cavallo, et al. v. Wyeth, et al., Civil Action No. 04-21248
Irene Chernack, et al. v. Wyeth, et al., Civil Action No. 04-21250
Laurie Crawford, et al. v. Wyeth, et al., Civil Action No. 04-21313
Cathy Davis, et al. v. Wyeth, et al., Civil Action No. 04-21296
Cynthia E. Dennis, et al. v. Wyeth, et al., Civil Action No. 04-21309
Regina E. Driggers, et al. v. Wyeth, et al., Civil Action No. 04-21207
Kathryn Duncan, et al. v. Wyeth, et al., Civil Action No. 04-21306
Sheridan Foreman, et al. v. Wyeth, et al., Civil Action No. 04-21264
Julia Fowler, et al. v. Wyeth, et al., Civil Action No. 04-21189
Margaret Francis, et al. v. Wyeth, et al., Civil Action No. 04-21243
Mary Angela Fruen, et al. v. Wyeth, et al., Civil Action No. 04-21289
Anita Fuhrman, et al. v. Wyeth, et al., Civil Action No. 04-21304
Barbara Fuller, et al. v. Wyeth, et al., Civil Action No. 04-21225
Albert L. Gale, et al. v. Wyeth, et al., Civil Action No. 04-21259
Billie J. Givens, et al. v. Wyeth, et al., Civil Action No. 04-21197
David Gossett, et al. v. Wyeth, et al., Civil Action No. 04-21281
Nancy Hanson, et al. v. Wyeth, et al., Civil Action No. 04-21290
Kim M. Hardy, et al. v. Wyeth, et al., Civil Action No. 04-21253
Helen Harrison, et al. v. Wyeth, et al., Civil Action No. 04-21322
Crystal Hayes, et al. v. Wyeth, et al., Civil Action No. 04-21242
Kathleen Hopper, et al. v. Wyeth, et al., Civil Action No. 04-21308
Vicky W. Huckeba, et al. v. Wyeth, et al., Civil Action No. 04-21194
Nona Hudgins, et al. v. Wyeth, et al., Civil Action No. 04-21272
Sarah C. Hudson, et al. v. Wyeth, et al., Civil Action No. 04-21232
Sylvia Huggins, et al. v. Wyeth, et al., Civil Action No. 04-21278
Eia Huse-Wooten-Plenty, et al. v. Wyeth, et al., Civil Action No. 04-21239
Dariece Jackson-Bartlett, et al. v. Wyeth, et al., Civil Action No. 04-21223
Beverly J. Johnson, et al. v. Wyeth, et al., Civil Action No. 04-21257
Monique Johnson, et al. v. Wyeth, et al., Civil Action No. 04-21230

Sherry Jones, et al. v. Wyeth, et al., Civil Action No. 04-21251
Jenny Joslyn, et al. v. Wyeth, et al., Civil Action No. 04-21303
Gerald E. Jundt, et al. v. Wyeth, et al., Civil Action No. 04-21252
David E. King, et al. v. Wyeth, et al., Civil Action No. 04-21198
Sharon Kirkpatrick, et al. v. Wyeth, et al., Civil Action No. 04-21311
Christine Knopf, et al. v. Wyeth, et al., Civil Action No. 04-21256
Sarah M. Kubelka, et al. v. Wyeth, et al., Civil Action No. 04-21203
Jenetta L. Langston, et al. v. Wyeth, et al., Civil Action No. 04-21204
Cynthia L. Lazenberry, et al. v. Wyeth, et al., Civil Action No. 04-21315
Susan Lindemann, et al. v. Wyeth, et al., Civil Action No. 04-21187
Socorro Lucero, et al. v. Wyeth, et al., Civil Action No. 04-21280
Allene Luke, et al. v. Wyeth, et al., Civil Action No. 04-21213
Selinda R. Mahan, et al. v. Wyeth, et al., Civil Action No. 04-21224
Eleanor Mauser, et al. v. Wyeth, et al., Civil Action No. 04-21196
Diane Maxwell, et al. v. Wyeth, et al., Civil Action No. 04-21279
Michelle McBride, et al. v. Wyeth, et al., Civil Action No. 04-21216
Deborah McCreary, et al. v. Wyeth, et al., Civil Action No. 04-21295
Ellen B. McFarland, et al. v. Wyeth, et al., Civil Action No. 04-21241
Louanne McKinney, et al. v. Wyeth, et al., Civil Action No. 04-21299
Shirley Ann McWhorter, et al. v. Wyeth, et al., Civil Action No. 04-21274
Jana Meyers, et al. v. Wyeth, et al., Civil Action No. 04-21307
Jack W. Miller, et al. v. Wyeth, et al., Civil Action No. 04-21237
James S. Mitchell, et al. v. Wyeth, et al., Civil Action No. 04-21235
Camille Moffitt, et al. v. Wyeth, et al., Civil Action No. 04-21297
Blondine Moreland, et al. v. Wyeth, et al., Civil Action No. 04-21233
Daisy Mosley, et al. v. Wyeth, et al., Civil Action No. 04-21331
Justin E. Nall-Tillman, et al. v. Wyeth, et al., Civil Action No. 04-21271
Susan Neils, et al. v. Wyeth, et al., Civil Action No. 04-21300
Marjorie Owens, et al. v. Wyeth, et al., Civil Action No. 04-21260
Delores Parks, et al. v. Wyeth, et al., Civil Action No. 04-21268
Lauralee Pasko, et al. v. Wyeth, et al., Civil Action No. 04-21218
Christeen Perry, et al. v. Wyeth, et al., Civil Action No. 04-21287
James Pierce, et al. v. Wyeth, et al., Civil Action No. 04-21312
Lucille Pietrocarlo, et al. v. Wyeth, et al., Civil Action No. 04-21199
Diane S Pinkney, et al. v. Wyeth, et al., Civil Action No. 04-21202
Stanley L. Pinsker, et al. v. Wyeth, et al., Civil Action No. 04-21231
Linda Pryor, et al. v. Wyeth, et al., Civil Action No. 04-21319
Bonnee Reddish, et al. v. Wyeth, et al., Civil Action No. 04-21284
Frances J. Ricketts, et al. v. Wyeth, et al., Civil Action No. 04-21270
Hubert Roberts, et al. v. Wyeth, et al., Civil Action No. 04-21247
Michel Rushing, et al. v. Wyeth, et al., Civil Action No. 04-21321
Angela D. Scott, et al. v. Wyeth, et al., Civil Action No. 04-21282
Susan N. Sharp, et al. v. Wyeth, et al., Civil Action No. 04-21229
Bobbie Sherod, et al. v. Wyeth, et al., Civil Action No. 04-21190
Irma Shor, et al. v. Wyeth, et al., Civil Action No. 04-21283
Betty Smith, et al. v. Wyeth, et al., Civil Action No. 04-21267

Fred Smith, et al. v. Wyeth, et al., Civil Action No. 04-21323
Monica L. Smith, et al. v. Wyeth, et al., Civil Action No. 04-21214
Mary A. Snow, et al. v. Wyeth, et al., Civil Action No. 04-21275
Constance M. Stafford, et al. v. Wyeth, et al., Civil Action No. 04-21286
Constance Stanton, et al. v. Wyeth, et al., Civil Action No. 04-21246
Diana Thompson, et al. v. Wyeth, et al., Civil Action No. 04-21277
Frank Topolski, et al. v. Wyeth, et al., Civil Action No. 04-20813
Theresa Vandewater, et al. v. Wyeth, et al., Civil Action No. 04-21227
Richard Walter, et al. v. Wyeth, et al., Civil Action No. 04-21285
Terri L. White, et al. v. Wyeth, et al., Civil Action No. 04-21262
Arthur Whitelaw, et al. v. Wyeth, et al., Civil Action No. 04-21288
Mary Wilkinson-Orvik, et al. v. Wyeth, et al., Civil Action No. 04-21310
Johnnie M. Williams, et al. v. Wyeth, et al., Civil Action No. 04-21238
Terri Lynn Wood, et al. v. Wyeth, et al., Civil Action No. 04-21294
Mary Wurdinger, et al. v. Wyeth, et al., Civil Action No. 04-21215
Teresa Yates, et al. v. Wyeth, et al., Civil Action No. 04-21293

Exhibit B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

OCT 15 2003

LUTHER D. THOMAS, Clerk

By:  Deputy Clerk

In re Fen-Phen Litigation

CIVIL ACTION
NO. 1:03-MD-1-RLV

O R D E R

These are product liability cases arising from the plaintiffs's ingestion and use of the diet drugs fenfluramine, dexfenfluramine, and phentermine (commonly referred to as "Fen-Phen"). Each of the 168 cases¹ was originally filed in the Superior Court of Fulton County, Georgia, but were subsequently removed to this court. Pending before the court are the plaintiffs' motions to remand [Doc. Nos. 10, 15, 16, 17, 18, and 21], the motions of Wyeth, Inc., and Wyeth Pharmaceuticals, Inc., {hereinafter "Wyeth"} (1) to stay proceedings pending transfer to the United States District Court for the Eastern District of Pennsylvania, which is the transferee court in the Fen-Phen multidistrict litigation [Doc. No. 20], (2) to exceed page limitations [Doc. No. 25], and (3) to sever and transfer venue [Doc. No. 23].

¹ There are approximately 14,600 plaintiffs, and each is a member of the settlement class certified by the United States District Court for the Eastern District of Pennsylvania for purposes of approval of a \$3.75 billion Nationwide Class Action Settlement Agreement. See *Brown v. American Home Products Corp.* (In re Diet Drugs), MDL 1203, 2000 WL 1222042 (E.D. Pa. August 28, 2000).

The motion to exceed page limitations is GRANTED. In its motion to stay, Wyeth asks this court to stay these proceedings so that the transferee court could rule on the pending motions to remand. Because this court has determined that the interests of judicial economy dictate that this court rule on the remand motions, the motion to stay is DENIED.

In seeking to have these cases remanded to the Superior Court of Fulton County, the plaintiffs contend that in each case there is not complete diversity of citizenship, as required by *Strawbridge v. Curtiss*, 7 U.S. 267 (1806). The plaintiffs accomplish this non-complete diversity feat by naming at least one plaintiff (among, in some cases, several hundred plaintiffs) who is not diverse from at least one defendant. In some cases, the plaintiffs include a New Jersey citizen, who would not be diverse from Wyeth, Inc., which has its principal place of business in that state; in other cases, the plaintiffs include a Pennsylvania citizen, who would not be diverse from Wyeth Pharmaceuticals, which has its principal place of business in that state; in still other cases, the plaintiffs include a Georgia citizen, who would not be diverse from certain employees of Wyeth, who are also Georgia citizens; additionally, there are some cases in which the plaintiff is a citizen of the same state as Celltech Pharmaceuticals, Inc., the successor in interest to Medeva Pharmaceuticals, Inc., which manufactured the drug phentermine.

In arguing that the cases should not be remanded, Wyeth contends that the plaintiffs have engaged in the practice of fraudulent joinder (of either a plaintiff or a defendant) in order to defeat diversity jurisdiction. Although mere misjoinder may provide a sufficient basis for defeating diversity jurisdiction, "improper and fraudulent joinder, bordering on a sham" will not. See *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996).

The undersigned is aware that several judges of this court have remanded other Fen-Phen cases, having found that the parties were properly joined and that there was not complete diversity of citizenship. However, after carefully reviewing those decisions and after thoroughly considering the briefs of the parties, the undersigned is persuaded that the July 30, 2003, decision by Judge Bartle in MDL litigation is the better reasoned. In Pretrial Order No. 2946, Judge Bartle carefully considered the identical arguments made by the plaintiffs in the instant cases. In that Pretrial Order, Judge Bartle denied motions to remand in another group of cases that had been filed in the Superior Court of Fulton County and which had been removed to this court.


The undersigned adopts Judge Bartle's reasoning and analysis in that Pretrial Order and concludes that the plaintiffs in the instant cases have engaged in fraudulent joinder in an attempt to

defeat diversity jurisdiction. Consequently, the motions to remand are DENIED.

Those defendants who have not already filed answers or other responsive pleadings will be permitted to do so. Otherwise, proceedings in these cases are hereby STAYED pending a determination by the Panel on Multidistrict Litigation as to whether they will be transferred to the United States District Court for the Eastern District of Pennsylvania.

Wyeth's motion to sever and transfer venue is DENIED. This denial, however, is without prejudice to the right of Wyeth to renew the motion when the cases are transferred back from the MDL court or, if the cases are not transferred, when the Panel denies the transfer.

SO ORDERED, this 14th day of October, 2003.


ROBERT L. VINING, JR.
Senior United States District Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Defendants' Joint Motion to Dismiss Fraudulently Joined Parties with Prejudice And Memorandum In Support Thereof was served this 15th day of October, 2004 by Federal Express Overnight Delivery upon:

All Counsel of record

in the above-captioned cases, and by first-class mail, postage prepaid, upon all other counsel required to be served by Pretrial Order No. 19 (the names of whom appear on the attached service list).

/s/ Stephen M. Brooks
Stephen M. Brooks

Dated: October 15, 2004

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